

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----:

GMO GAMECENTER USA, INC., : Case No.: 22-cv-5974

et al., :

Plaintiffs, :

v. :

WHINSTONE US, INC. , : New York, New York

Defendant. : October 4, 2023

-----:

TRANSCRIPT OF STATUS CONFERENCE HEARING
BEFORE THE HONORABLE KATHARINE H. PARKER
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For Plaintiff: HAYNES AND BOONE LLP
BY: Leslie C. Thorne, Esq.
Michael Freyberg, Esq.
30 Rockefeller Plaza
New York, New York 10012

For Defendant: DEBEVOISE & PLIMPTON LLP
BY: Brandon R. Fetzer, Esq.
Jillian Tancil, Esq.
66 Hudson Boulevard
New York, New York 10001

Proceedings recorded by electronic sound recording;
Transcript produced by transcription service.

1 THE DEPUTY CLERK: Calling case
2 22-cv-5974; GMO Game Center versus Whinstone US
3 Corp.

4 Beginning with counsel for the plaintiff,
5 please make your appearance for the record.

6 MS. THORNE: Leslie Thorne and Mike
7 Freyberg for plaintiffs. And Mr. Freyberg is going
8 to be handling today's conference.

9 THE COURT: Great.

10 THE DEPUTY CLERK: And counsel for the
11 defendant, please make your appearance.

12 MR. FETZER: Brandon Fetzer and Jillian
13 Tancil from Debevoise on behalf of Whinstone.

14 THE COURT: Hi. Okay. Thanks for coming
15 in.

16 So I wanted to get a report on where you
17 are on discovery. Why don't we hear first from
18 plaintiff.

19 MR. FREYBURG: Sure, Your Honor. So I
20 can, sort of, just run down the list of tasks --

21 THE COURT: Perfect.

22 MR. FREYBURG: -- that we've completed
23 since the last conference.

24 So both parties have served third-party
25 subpoenas, document subpoenas. GMO has served -- or

1 I should say it issued service six -- for six
2 different third parties, and I believe Whinstone has
3 issued subpoenas for two, but they can correct me if
4 I'm wrong on that.

5 The parties filed the ESI protocol, which
6 the Court approved this morning, and GMO
7 anticipates, actually, producing another set of
8 documents, over 1,000 documents sometime today.
9 That hasn't been done yet, but we do anticipate that
10 that will be done at some point today.

11 And then, finally, the last thing on my
12 list is with regard to GMO's fourth amended
13 complaint. This is something we raised, I believe,
14 at the last conference. And as of yesterday, the
15 parties are in agreement on that, actually.

16 THE COURT: Oh, good.

17 MR. FREYBURG: And so we sent our draft
18 that we would like to file to Whinstone's counsel.
19 They have consented to our filing it, obviously,
20 reserving all rights with regard to --

21 THE COURT: Defense's --

22 MR. FREYBURG: -- how they respond to --
23 that's right -- defendants -- how defendants will
24 respond to that. And, yeah, we're also agreeing to
25 give them 30 days to respond to that --

1 THE COURT: Okay.

2 MR. FREYBURG: -- to that as well.

3 THE COURT: Okay.

4 MR. FREYBURG: And we wanted to ask
5 Your Honor how exactly mechanically we should --
6 should we file, like, an unopposed motion for leave
7 or should we file, like, a stipulation? Or what's
8 your preference on that?

9 THE COURT: So I think technically you
10 should file it as a motion to file and indicate that
11 it is unopposed --

12 MR. FREYBURG: Yep. Okay.

13 THE COURT: -- by defendant, and then
14 that can be granted.

15 MR. FREYBURG: Perfect. Okay.

16 THE COURT: I think that's the best way
17 to go about it.

18 MR. FREYBURG: Okay. So we will -- we'll
19 draft that and get that on file probably within the
20 next few days.

21 THE COURT: Okay. Great.

22 So in terms of the -- I know you said
23 that you're producing about 1,000 documents today.
24 What does the remainder look like? I saw in the ESI
25 protocol, you've identified your custodians. I

1 assume that those are the custodians you're pulling
2 from right now as part of this production, rolling
3 production.

4 MR. FREYBURG: Yes. Yep, that's correct.
5 So I think collections for the most part are
6 complete. So it's really just about getting
7 documents reviewed and then out at this point.

8 We've been going back and forth on search
9 terms to apply to the documents that have been
10 collected to generate a review set. And we, I
11 believe, are pretty close to finalizing that. For
12 search terms to apply to Whinstone's documents, I'd
13 say we're near final. And definitely, within the
14 next day or so, I think we can come to some
15 agreement on that.

16 With GMO's documents, there may be a bit
17 more back and forth to do, but I think we anticipate
18 getting that done at some point this week. This,
19 obviously, also all plays into the amendment to the
20 case schedule, which I believe at the last
21 conference we brought up. And I think both parties
22 are definitely in agreement that the case schedule
23 is going to have to be amended. We would like to
24 get that finalized by sometime this week, just so we
25 know, you know, the path going forward a little bit

1 better.

2 THE COURT: Okay. So right now we have
3 the close of fact discovery at the end of October,
4 which clearly you're not going to meet --

5 MR. FREYBURG: Correct.

6 THE COURT: -- and the close of expert
7 discovery at February, mid-February.

8 So tell me what is left in terms of the
9 document production, which obviously you want to get
10 out for, you know, most of the depositions. I also
11 want to know whether you can accelerate production
12 of documents for certain witnesses; in other words,
13 so that you can, sort of, keep the case moving
14 along.

15 MR. FREYBURG: Yeah, so I think, you
16 know, sort of, in order, the priority will be
17 nailing down at least a preliminary set of search
18 terms, just so we can get reviewing and then get
19 more documents out after that. The documents we
20 plan on producing today are not contingent on those
21 search terms. There were documents GMO and us
22 identified as not needing to be -- you know, have
23 search terms applied to in order to produce them.

24 So those will be out, and then it will
25 just be about getting final on the search-term

1 agreement, and then getting that review set. We
2 definitely -- I think both parties anticipate
3 producing a lot of documents for this case, and we
4 definitely want to keep that moving and accelerated
5 in any way we can, so that will probably mean, you
6 know, production in waves as they become available.

7 THE COURT: Right. So when do you
8 anticipate substantial completion of the document
9 production?

10 MR. FREYBURG: Yeah, so we were going to
11 propose -- and this isn't something we've yet
12 proposed to Whinstone's counsel yet, but we were
13 going to propose a general case deadline extension
14 of three to four months. And so I think that, you
15 know, puts the fact-discovery deadline -- right now
16 it's at late October, so that would -- November,
17 December, January --

18 THE COURT: Probably January?

19 MR. FREYBURG: Like, January, February;
20 something like that. And so I think at that point
21 we would, you know, aim to have all documents
22 produced at that point.

23 THE COURT: Right, but you -- but my
24 earlier question was really aimed at not only do you
25 need to produce all the documents, but you've got to

1 depose some witnesses.

2 MR. FREYBURG: Oh, absolutely.

3 THE COURT: So when would you anticipate
4 starting depositions in this time -- extended time
5 frame?

6 MR. FREYBURG: Yeah, I think we would
7 probably, at least, like to have one more production
8 of documents before depositions occur, but I think
9 that can probably happen within the first month --
10 or the next month or so, just so we have some
11 documents to use in those depositions and to
12 actually inform who we're going to need to depose as
13 far as third parties and things like that.

14 And, yeah, I know you mentioned third
15 parties. We obviously have document subpoenas out
16 to them, so I think the need to depose some of them
17 will probably depend on what we receive in return to
18 those document subpoenas and also on party discovery
19 that takes place. But I think we do have a pretty
20 good sense of who we're going to depose as far as
21 parties and non-parties. Some of it, again, will
22 depend on what documents we receive, but...

23 THE COURT: And are the non-parties
24 causing any issues with -- are they raising any
25 objections? Do you anticipate motions to compel?

1 MR. FREYBURG: None so far, although the
2 subpoenas were just issued, so it's a little bit
3 TBD. Obviously, as issues arise, you know, we'll
4 address those. And I don't -- I don't know, also,
5 if the parties will have any issues with any
6 third-party subpoenas that have gone out, too, so
7 we'll have to address that as well. But I'd say
8 it's a little too early to tell, just given that
9 they went out over the last couple days.

10 THE COURT: Okay. All right. Fine.

11 So from defendant's perspective, tell me
12 what you anticipate and when you anticipate being
13 able to depose folks.

14 MR. FETZER: Yeah, sure. I think -- I
15 agree with everything that Mr. Freyberg said. I --
16 I'm thinking we might need a little longer than they
17 just estimated to pull it all off. Just in terms of
18 volume, I think we're -- Whinstone may end up
19 reviewing something between 50 and 100,000
20 documents, and GMO something, perhaps, a little bit
21 greater than that. Maybe a few more custodians.
22 And with the holidays and -- I think we -- I think
23 three to four months is probably a little tight.
24 Something a little bit longer than that, I think, we
25 could probably do.

1 THE COURT: How many witnesses are you
2 anticipating deposing?

3 MR. FETZER: So we just don't know. I
4 can't say right at this moment. We, I think, to
5 this point, have only gotten 100,000 documents.
6 We'll get another 1,000 documents today.

7 THE COURT: Well, you know a little bit
8 because you have some initial disclosures.

9 MR. FETZER: Sure.

10 THE COURT: I mean, there were people who
11 came to the settlement conference who are people
12 with knowledge.

13 MR. FETZER: Yep. I would assume
14 something in the eight-to-ten range.

15 THE COURT: Okay. So in total, are the
16 parties thinking this is a case that will require,
17 like, maybe 16 -- or up six -- between 16 and 20
18 depositions total between the --

19 MR. FETZER: Yes.

20 MR. FREYBURG: That's probably about
21 right.

22 THE COURT: Okay. So the early -- the
23 first quarter of 2024 will be very busy then.

24 And are all the depositions going to take
25 place in the U.S. or by video? Is that what you're

1 planning now? Are any going to take place in Japan?
2 What's going to happen?

3 MR. FREYBURG: So we haven't quite
4 discussed the mechanics of each deposition. I
5 think, from our client's perspective, we're probably
6 happy to do some of those by video, if it speeds
7 things up, especially. But, yeah, that's definitely
8 something we have to discuss. I think for the U.S.
9 Depositions, we would probably prefer doing them in
10 person, but for the international ones, we
11 understand that those can be challenging, and so
12 video might make more sense for those.

13 THE COURT: Okay.

14 MR. FETZER: Yeah, we'll have to give
15 that some thought. I assume we'll have to have
16 translators involved. And, you know, there are some
17 disadvantages to doing that remotely.

18 THE COURT: Right. With a translator.

19 MR. FETZER: Yeah, yeah. I think that
20 might just become a little bit too complicated.

21 THE COURT: Yeah.

22 MR. FETZER: We'll, of course -- we'll,
23 of course, you know, try to work it out.

24 THE COURT: Yeah.

25 MR. FETZER: But I'm thinking we probably

1 want to do them in person if we can.

2 THE COURT: All right. So I think you
3 ought to be thinking about those deposition dates.
4 I know it's early days still, but you ought to be
5 thinking about, sort of, plotting out when you're
6 going to do that. And I would ask you to meet and
7 confer and try to cooperate on dates if there's
8 going to be -- if there's going to be travel, that
9 you try to work together to get dates that make
10 sense.

11 And because of the holidays, I think
12 counsel are going to need to -- because, Counsel,
13 I'm assuming this is not your only case that you're
14 working on, that you have other client demands, so
15 you ought to be thinking about what dates you can,
16 kind of, hold as potential deposition weeks, for
17 example, in different locations so that you can get
18 people thinking ahead because people are working out
19 on their calendars, you know, three months in
20 advance anyway. So you should start having some of
21 those conversations with the understanding that
22 maybe some dates have to be pushed, but that you're
23 working towards that; okay?

24 MR. FETZER: Understood.

25 THE COURT: And from your subpoenas that

1 you served, have you heard any objections yet? Are
2 you expecting any issues with them?

3 MR. FETZER: No objections yet. They
4 were just served, I think, Friday and Monday, so
5 it's a little early. We gave folks a little bit
6 more time than the Federal Rules permit just to
7 be -- you know, they're third parties; to try to
8 avoid disrupting their operations.

9 We should know -- I think we set
10 October 19th as the date that they should object or
11 get back to us in some way, so we should know by
12 then or in advance of then.

13 THE COURT: Okay. And do you anticipate
14 any privilege issues?

15 MR. FETZER: In terms of third-party
16 subpoenas, or...

17 THE COURT: In terms of general.

18 MR. FETZER: I'm not aware of anything
19 that's coming to mind right now.

20 THE COURT: Okay.

21 MR. FREYBURG: Yeah. No, neither are we.
22 Yeah, nothing specific, no.

23 THE COURT: That's good. Okay.

24 So what -- so it sounds like you're
25 cooperating. I'd like to have another conference,

1 say, in -- before Thanksgiving so I can hear what's
2 happening with the subpoenaed parties. If there are
3 any issues, I want you to bring those forward right
4 away, because if there needs to be any kind of
5 motion to compel, we'd have to get the third parties
6 to come in and deal with that right away.

7 So, Chris, do we have a date in November
8 for a conference?

9 THE DEPUTY CLERK: Judge, how about
10 4 o'clock on November 16th?

11 THE COURT: Yeah, 4 o'clock, November
12 16th. It's a Thursday.

13 MS. THORNE: That works for GMO,
14 Your Honor.

15 THE COURT: Okay. Now, I know I've asked
16 this before. Are the parties in a position to
17 further discuss settlement? Any updates on that
18 front?

19 MR. FREYBURG: I think at this time,
20 probably, yeah, off the table.

21 THE COURT: Not so much. Okay.

22 Well, I'll keep asking you just in case
23 you can resolve it. Most cases do resolve by
24 settlement.

25 Are there any other items that

1 plaintiff's counsel would like to raise?

2 MR. FREYBURG: Yeah. Just one item.

3 I think in discussing search terms with
4 Whinstone's counsel, there are probably certain
5 categories of documents that they are going to
6 object to producing that we feel are relevant. And
7 so I think when we come to an agreement on search
8 terms, we'll probably put those to the side for now
9 just to keep things moving, but we did want to ask
10 the Court how -- if there's any way, as far as
11 mechanically, how you'd like us to deal with that
12 dispute.

13 THE COURT: Yeah. How -- can you just
14 list what the categories are.

15 MR. FREYBURG: Yeah. No problem.

16 So one category is documents concerning
17 the Texas Data Center as a whole, rather than just
18 the buildings where GMO places their machines or
19 otherwise uses or potentially uses. So
20 specifically --

21 THE COURT: Because there were two
22 buildings, right, that --

23 MR. FREYBURG: There was --

24 THE COURT: There was the B building and
25 then there was one other building?

1 MR. FREYBURG: That's right.

2 So originally we were talking about
3 Building A, where GMO has always operated, so that's
4 undisputed. We know documents concerning that
5 building should be produced, so we're not fighting
6 on that one.

7 But then there's also Building B, where
8 GMO was looking to move its machines to but never
9 did. I think that's also undisputed. And then
10 there's Building X, where GMO's non-operating
11 machines have been stored over time.

12 THE COURT: Oh, the storage facility.

13 MR. FREYBURG: Yeah. It's still in the
14 same facility; it's just a separate building on that
15 facility.

16 And then what we're looking for is
17 documents concerning other buildings aside from
18 those three, so relating to the data center.

19 THE COURT: What kind of information do
20 you want on those buildings and why?

21 MR. FREYBURG: So documents concerning
22 Whinstone's operations of the data center as a
23 whole, including with regard to those buildings. We
24 feel that how Whinstone is operating those buildings
25 has some bearing on how they might operate GMO's

1 buildings as well. We've alleged facts concerning
2 issues relating to Whinstone holding up its end of
3 the bargain with regard to power supply and with
4 regard to --

5 THE COURT: Power supply.

6 MR. FREYBURG: -- the conditions of the
7 data center as well.

8 Both of these issues are something other
9 customers at the data center have raised in separate
10 litigations, so we feel that --

11 THE COURT: What kind of conditions?

12 MR. FREYBURG: So one has to do --

13 THE COURT: Like water leakage; that kind
14 of thing?

15 MR. FREYBURG: Not water leakage, but
16 cooling, which, kind of, relates to water.

17 THE COURT: Cooling.

18 MR. FREYBURG: So adequate cooling for
19 the machines, which affects how well they perform.
20 Dust is another one that also affects performance.
21 I think general organization, the machines and how
22 they're moved. Whinstone had obligations to plug in
23 power to certain types of the machines and literally
24 move, you know, pieces of equipment and cables and
25 things like that at GMO's request.

1 And so all of these are issues in this
2 litigation, and they're issues in separate
3 litigations brought by other customers at the same
4 data center who are using different buildings at
5 times.

6 THE COURT: Does the contract that GMO
7 has concerning its use of the building provide any
8 specifications for cooling, dust, treatment of the
9 machines?

10 MR. FREYBURG: Yeah. It explicitly
11 provides that all that has to be done. As far as
12 more specifics than that, I think it's a bit
13 general, but it's not explicitly -- I don't think,
14 as far as I'm standing here right now, that there's
15 any sort of, like, levels of cooling or dust that
16 have to be maintained in the agreement itself.

17 THE COURT: So obviously, you need to
18 understand what the conditions were in the buildings
19 where you were or had an option to go, or how
20 they're being stored now as if they're being kept in
21 proper condition. But why is it relevant if
22 there's -- let's say there's Buildings C, D and E.

23 Why -- if those buildings have different
24 machines and different -- you know, different
25 companies with different contracts, why would that

1 be relevant to the precise issues that your client
2 experienced in Building A? And why is that
3 proportional to the needs of the case?

4 MR. FREYBURG: Well -- so if there's --
5 I -- if there's -- if Whinstone is not performing
6 its very similar hosting contracts for their
7 customers at the same facility under the same
8 management, then I would say there's a higher degree
9 of likelihood that it's also happening in the
10 buildings where GMO's machines are kept.

11 Also, these issues --

12 THE COURT: But you're going to know.
13 Isn't some of this objective? It was either kept at
14 a certain temperature or it wasn't. There was
15 either dust or there wasn't.

16 I mean, some of this is -- this is --
17 they either fulfilled it -- the machines require X
18 to be in top performance, and they either kept it at
19 the -- you know, the room at 65 degrees or they
20 didn't, you know. I mean, what happened in another
21 building, you know --

22 MR. FREYBURG: I think we have to find
23 that out, Your Honor. I mean, I think that's,
24 respectfully, the subject of the case and of
25 discovery, is whether they performed and whether

1 they performed with regard to --

2 THE COURT: Whether they performed as to
3 your contract is what is critical.

4 MR. FREYBURG: That's correct, but we
5 think that it's relevant if they performed very
6 similar obligations under similar contracts at the
7 same data center has some bearing on whether they
8 did for us as well.

9 THE COURT: So what element of your
10 causes of action does that go to?

11 MR. FREYBURG: It goes to -- I mean, our
12 main cause of action is the -- I would say the
13 failure is on Whinstone's part to supply power,
14 right? That's probably --

15 THE COURT: Breach of contract.

16 MR. FREYBURG: Breach of contract,
17 absolutely.

18 THE COURT: So normally, for a breach of
19 contract, you're not looking at how they dealt with
20 other contracts.

21 MR. FREYBURG: That's true, Your Honor,
22 and I definitely understand what you're saying. And
23 I anticipate Whinstone will make very similar
24 arguments. We still do think there's some bearing
25 because we're dealing with the same data center and

1 very, very similar complaints from other customers
2 who are in litigation with Whinstone right now.

3 And some of these customers, for all we
4 know, may have actually been operating in the
5 buildings that GMO was operating. I think that's
6 something that's also the subject of discovery that
7 we don't --

8 THE COURT: Well, if something was in
9 your same building, what the conditions are in the
10 building are the conditions, you know, in the
11 building. So other customers' experience in the
12 same building, A, for example, I can see why that
13 would be relevant.

14 MR. FREYBURG: Yeah. And I understand
15 your points there.

16 THE COURT: Yeah, I mean, because for a
17 breach of contract and the types of breaches that
18 you're saying are objective types of things -- this
19 isn't a tort case.

20 MR. FREYBURG: Yeah.

21 THE COURT: And it's not something -- you
22 know, this is not, like, a habit kind of --

23 MR. FREYBURG: I think one more --

24 THE COURT: My concern is to get into
25 other cases that in -- then there, it may not be

1 informative.

2 MR. FREYBURG: I understand, Your Honor.

3 THE COURT: So I think what I would just
4 say is think about really tailoring --

5 MR. FREYBURG: Yeah.

6 THE COURT: -- what you really need.

7 It's one thing to have a schematic of
8 what all the buildings are there, right?

9 MR. FREYBURG: Right. Right.

10 THE COURT: And have, sort of, a high
11 level of understanding. Are they all powered the
12 same way? Are they all --

13 MR. FREYBURG: Yeah.

14 THE COURT: -- maintained the same way?
15 That's, sort of, one level.

16 But if you're talking about getting into
17 particulars, you have to think through what's
18 really, really needed and proportional to the needs
19 of the case.

20 Let me hear from defendant.

21 MR. FETZER: Yeah, Judge, I agree with
22 almost everything you said. I'll just add a few
23 things.

24 There's confidentiality concerns. There
25 are other customers using these other buildings.

1 The customers are governed by a separate set of
2 contracts that have absolutely nothing to do with
3 this case.

4 GMO is responsible for maintaining the
5 conditions of its machines within the building, and
6 so, you know, whether or not other customers had
7 that same obligation is just completely irrelevant.
8 So if it's dusty in one building, it doesn't
9 necessarily mean that's Whinstone's fault. It
10 depends on what the contract said and what the
11 customer was responsible for doing.

12 THE COURT: Well, first of all, customer
13 confidentiality can be taken care of easily. We
14 don't -- you can have anonymized -- you can have,
15 you know, anonymous customer information.

16 And, you know, dust in a building is dust
17 in a building. That's not maintenance of a machine.
18 That's the cleanliness or the atmosphere within
19 which the machines are kept or housed.

20 So I can see why some information about
21 the footprint of the -- of your client's facility --
22 and there might be some buildings where -- I don't
23 know if there's some buildings where the power is
24 not, you know, just like in apartment complexes.
25 You might have one building that's, you know,

1 constantly having a problem because it's --
2 there's -- it's older, or for whatever reason, a
3 pipe keeps breaking in that building.

4 There might be some high-level
5 information about the conditions of the building and
6 the -- as compared to other buildings that
7 potentially could be relevant. I don't know if
8 power is being drawn away from Building A to
9 Building C, I mean, because of however the lines are
10 set up or because of a specific decision made by
11 your client.

12 Those kinds of macro issues might be
13 relevant, I think, to performing the obligation.
14 Or, you know, for example, if there's an allegation
15 that your client favored one customer or another,
16 so -- or more -- you know, gave more power, then
17 that potentially could be relevant, just how it's
18 all hooked in.

19 MR. FETZER: Sure. And I hear where
20 you're going with that. I think as it relates to
21 power in Building A and where that power went, I
22 don't think we have any disagreement with opposing
23 counsel.

24 What I think they're looking for is,
25 though -- if I can infer from the search terms -- is

1 name of customer within 20 words of complaint,
2 right? Like, name of third-party customer that has
3 nothing to do with this case, nothing to do with the
4 Whinstone and GMO contract.

5 And it also assumes in some way that all
6 the buildings are the same. Buildings just aren't.
7 And the type of mining in each building isn't the
8 same either. There's quite a few -- or I don't know
9 if it's quite a few, but there's a few buildings --
10 or I have personally been in at least one building
11 where the type of mining is immersion, where the
12 mines are put in a pool of oil or liquid, and so
13 it's -- there is no apples-to-apples comparison.

14 THE COURT: Well, so -- but to avoid
15 disputes, you can provide a schematic. We have
16 these buildings. This -- you know, these are -- you
17 know, this has immersion machines. This has this
18 machine. This has -- you could provide some of that
19 macro information that might obviate the need for
20 search terms. And if there's a complaint, maybe
21 there's complaints from another customer about the
22 conditions in Building A. That's one thing.

23 MR. FETZER: That's fine, yeah.

24 THE COURT: If there's dust, if there's a
25 leak, if it's hot or whatever, if there's -- that

1 might be relevant to know, right?

2 MR. FETZER: Sure. Building A, we have
3 no issue with. Whatever we have with GMO's
4 operations, Building A, and whether someone
5 complained if it was dusty in Building A, we have no
6 issue there. The issue is where it starts to get
7 into other customer contracts and what other
8 customers are saying to Whinstone about Building G,
9 for example, right? We just don't see that as being
10 relevant.

11 THE COURT: Well, it seems to me that it
12 would make sense to provide some high-level
13 information. There are ten buildings, Buildings A,
14 B, C, D -- whatever they are lettered -- and this
15 one has the immersion machines. This one has
16 similar kinds or more recent models of the type of
17 mining that your machine has, the -- you know, the
18 power, the -- like, the general wattage -- or
19 however that's measured -- that's allocated to each
20 building.

21 And I don't know if there's -- different
22 buildings have different specifications, like one
23 building is kept at 65 degrees, one building is kept
24 at 60 degrees. I have -- you know, maybe there's
25 specifications for buildings that there's -- on a

1 macro level. And maybe there's, you know, one
2 person who maintains -- who's responsible for
3 maintaining Buildings A through C, and one person --
4 maybe there's some just real basic information like
5 that, that would then allow you to have a more
6 meaningful conversation with plaintiff's counsel
7 about what really is needed, what could be
8 anonymized, you know; that type of thing.

9 MR. FETZER: Okay. Sure.

10 THE COURT: So I just ask you-all to
11 really try to narrow down this dispute as to, you
12 know, what's really -- what really is important and
13 not really relevant, but what could be just helpful
14 in --

15 MR. FETZER: Certainly.

16 THE COURT: -- you know, some of that
17 information.

18 What are -- are there any other
19 categories of documents that are like this?

20 MR. FREYBURG: Yes, Your Honor. We've,
21 kind of, touched on one other, which is documents
22 concerning other customers at the data center. So
23 I --

24 THE COURT: Yeah.

25 MR. FREYBURG: We may have fully

1 addressed that.

2 THE COURT: Yeah.

3 MR. FREYBURG: I think we're making
4 similar arguments for why those are relevant.

5 I will just note our complaint does
6 explicitly allege that other customers are being
7 prioritized over GMO, and so that's another --

8 THE COURT: In terms of power?

9 MR. FREYBURG: In terms of power, in
10 terms of services that Whinstone is supposed to
11 provide under these hosting contracts. And so
12 that's in our complaint. I think it's in dispute.
13 It would be relevant at that point.

14 THE COURT: Well, I mean, but you -- it
15 sounds like, for that, it would just be helpful to
16 have some macro information first, like what was the
17 power given to each building over the relevant
18 period and what was the maintenance schedule, for
19 example? Maybe there's just a general maintenance
20 schedule that --

21 MR. FREYBURG: Right.

22 THE COURT: -- for each building.
23 Something general like that so that you can, sort
24 of, see that, and that -- that might be something
25 that could be helpful.

1 MR. FETZER: Sure. We're happy to look
2 into that. I'm assuming it varies, right? It
3 really depends on the contract --

4 THE COURT: Yeah, sure.

5 MR. FETZER: -- and whether or not
6 Whinstone had any obligation to do anything other
7 than flip the power on.

8 THE COURT: Sure. Sure. I understand.

9 But if you have -- in Building A, let's
10 say you have a customer that took over the entire
11 Building C, and they specifically asked for and paid
12 for daily dust -- you know, HEPA filters and
13 whatever they did. Maybe you could provide some,
14 you know, information like that on an
15 attorney's-eyes-only basis to just -- you know,
16 without -- you could anonymize, potentially, the
17 customer name.

18 MR. FETZER: Sure.

19 THE COURT: Just not necessarily show the
20 price that was paid, but you could provide a little
21 bit of information so that they understand there was
22 a different -- there might be a reason why a
23 building had different maintenance or different
24 features.

25 MR. FETZER: Sure. Sure. And we're

1 happy to explore that.

2 THE COURT: Yeah.

3 MR. FETZER: I hear you to be saying that
4 we should continue to meet and confer and, kind
5 of --

6 THE COURT: Yes.

7 MR. FETZER: -- sort this out so that a
8 letter doesn't land on the docket.

9 THE COURT: Yes. Right. Because --

10 MR. FETZER: Totally understand.

11 THE COURT: What can happen in cases,
12 especially when there's going to be a lot of
13 discovery, is that counsel don't try hard enough to
14 offer solutions, to offer compromises. So put
15 yourselves in each other's shoes and say, well,
16 okay, maybe this will resolve this issue. So that's
17 what I'm asking you to do.

18 MR. FREYBURG: Sure.

19 MR. FETZER: What are the other -- any
20 other categories?

21 MR. FREYBURG: There's just one more, and
22 I think this is also one we'll have to, sort of, dig
23 into the specifics on a bit. But we did ask for
24 documents concerning a company called Northern
25 Data's dispute with Riot Blockchain, which is

1 Whinstone's parent, concerning the sale of Whinstone
2 from Northern Data to Riot.

3 GMO is actually named in the allegations
4 in that case, which has since settled. And from
5 what I understand from Whinstone's counsel, either
6 no or very little discovery took place in that case
7 before it did. And we're not necessarily looking
8 for discovery, just exchange in that case in
9 general.

10 We're really looking for things that
11 concern GMO's dispute with Whinstone, this case
12 we're here for, because that claim, actually, that
13 GMO made -- I'm not sure it was litigation quite
14 yet, but when that sale was occurring, the claim
15 that GMO made to Whinstone as a potential -- formed
16 a potential liability for Whinstone, which played
17 into how much Riot was going to pay for Whinstone in
18 that. And so that's a subject in that dispute, and
19 so what we're looking for are documents that
20 concern, really, GMO's claim and this case --

21 THE COURT: You mean what was
22 communicated to Riot about that?

23 MR. FREYBURG: Yeah, potentially.

24 THE COURT: Or what was provided in due
25 diligence?

1 MR. FREYBURG: Potentially either/or.
2 Yeah, one thing that comes up is, like you said,
3 communications between those parties concerning
4 GMO's claim and the liability there. All of that
5 relates to the power --

6 THE COURT: Like, if there was a value,
7 like, a reserve or something placed on -- for the
8 litigation?

9 MR. FREYBURG: Yeah. Like, how they were
10 viewing the merits of GMO's claim and how that
11 played into value for the sale.

12 THE COURT: Do you have the agreement,
13 the purchase agreement?

14 MR. FREYBURG: We do have the purchase
15 agreement, yes. GMO is not in that agreement, of
16 course, but we understand from the litigation
17 documents that were filed, including Northern Data's
18 claim -- I'm sorry -- Riot's claims that the GMO
19 dispute was a major part of that case.

20 The other relevant part of that case
21 deals with power sales and, actually, Whinstone's
22 sharing of power credits. And so I -- from our
23 understanding of the agreement, Riot -- I'm sorry --
24 Northern Data, as the seller, would be entitled to
25 power credits on an ongoing basis as a result of

1 that sale. And they were claiming that those power
2 credits were not, in fact, shared with them.
3 That -- that is quite similar to what we're claiming
4 in this case as far as power credits and power sales
5 not being shared with GMO under its agreement with
6 Whinstone.

7 THE COURT: What is defendant's position
8 on that?

9 MR. FETZER: Well -- so first, it's a
10 lawsuit between Riot and Northern Data. Whinstone
11 has nothing to do with it, so it's unclear why
12 they're coming to Whinstone to try to get the
13 documents about a suit that Whinstone is not a part
14 of.

15 And then, second, I don't see the
16 relevance of the dispute between Riot and Northern
17 Data as it relates to the power credits, or whatever
18 else they're looking for, to the breach-of-contract
19 claim that they have asserted in this case.

20 THE COURT: Because from your position,
21 it's only what power was supplied pursuant to the
22 contract?

23 MR. FETZER: Right.

24 THE COURT: Or not supplied?

25 MR. FETZER: Right, exactly. There's a

1 contract. It had certain provisions. The fight is
2 over whether or not Whinstone and GMO lived up to
3 their obligations under the contract. Whether
4 there's a contract between third parties, like with
5 the sale of Whinstone and their distribution of
6 proceeds or power credit or whatever, is a totally
7 separate sideshow that just doesn't matter to the
8 Texas agreement that is driving this litigation.

9 THE COURT: But to the extent that there
10 were statements made about this suit to Riot, or
11 representations made about the view on whether this
12 case had merit, didn't have merit, and why, that
13 might be something that could be relevant.

14 MR. FETZER: Sure. And on that point, I
15 don't think we're objecting to GM -- sorry. We
16 haven't objected to the production of documents from
17 Whinstone concerning the case or claims or the value
18 of those claims. Some of that is probably
19 privileged, so we'll retract on that ground. But if
20 there's a document from someone at Whinstone saying
21 to someone at Northern Data, hey, what's up with
22 this litigation? Like, what's the risk here? What
23 are we looking at? How do we value that? That's
24 not what I understand their requests to be aimed at.
25 And if it were, I don't think that's something that

1 we're objecting to. What they asked for was just
2 the discovery exchanged in the case between Riot and
3 Northern Data.

4 THE COURT: All right. So I think
5 further meet and confer is needed on this issue.
6 And what I would like is a status letter in advance
7 of the November conference, a week in advance,
8 teeing up any issues. If you anticipate there's
9 going to need to be any kind of motion to compel
10 with any third party, you should let me know as soon
11 as possible, because we could potentially invite a
12 third party to attend that November conference so
13 that gets resolved. Okay?

14 So don't file any motions. Just
15 highlight if you think there's a dispute that needs
16 resolution, and I'll try to resolve it at that
17 conference. And I don't want you to go into a huge
18 back and forth. Keep the agenda letter to four
19 pages. I just -- don't turn it into any kind of
20 brief. I'll take a look at it, and I'll listen to
21 you. And if I think I need further briefing, we can
22 do that, okay, but don't turn the agenda letters
23 into briefs. Okay.

24 Anything else from plaintiff's
25 perspective?

1 MR. FREYBURG: Nothing from us, Your
2 Honor.

3 THE COURT: Anything else from defense's
4 perspective?

5 MR. FETZER: Nothing from us.

6 THE COURT: All right. Thank you very
7 much. Then we will adjourn. And feel free, like I
8 said, to go to 23rd floor.

9

10 0o0

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, Adrienne M. Mignano, certify that the
foregoing transcript of proceedings in the case of
GMO Gamecenter USA, Inc. v. Whinstone US, Inc.;
Docket #22CV5974 Was prepared using digital
transcription software and is a true and accurate
record of the proceedings.

Signature Adrienne M. Mignano
ADRIENNE M. MIGNANO, RPR

Date: October 5, 2023